

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

DEANTE DRAKE,

Petitioner,

v.

Civil Action No. 16-1595

Judge Nora Barry Fischer/

Chief Magistrate Judge Maureen P. Kelly

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

MEMORANDUM ORDER

The “Petition to vacate conviction pursuant to writ of error coram nobis[.]” (the “Petition”) ECF No. 4, was filed *pro se* by Deante Drake (“Petitioner”). In the Petition, Petitioner attacked his Pennsylvania convictions arising on October 22, 1993 (“the October 22, 1993 state court convictions”). By the time Petitioner filed the Petition, he had completed his sentences for the October 22, 1993 state court convictions.

The case was referred to Chief Magistrate Judge Maureen Kelly in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Local Civil Rules 72.C and D. Chief Magistrate Judge Kelly issued a Report and Recommendation (the “Report”), recommending that the Petition be dismissed pre-service because the a United States District Court does not have jurisdiction to review a state court conviction by means of a petition for writ of error coram nobis. ECF No. 5. Furthermore, the Report noted that even if the Petition were construed as a Petition for Writ of Habeas Corpus, the Petition would still be dismissible pre-service because Petitioner was no longer in custody pursuant to the October 22, 1993 state court convictions that were the object of Petitioner’s attack. Petitioner was notified that he had until December 5, 2016 to file Objections to the Report. On December 6, 2016, Petitioner’s Objections were received by

the Court. ECF No. 6. Pursuant to the prisoner mail box rule, we find the Objections to be timely filed.

Having thoroughly reviewed the Report and the Objections, we find that the Objections do not merit the rejection of the Report.

The primary objection by Petitioner is that the Report's conclusion that the federal courts lack subject matter jurisdiction to entertain a petition for writ of error coram nobis to review state court convictions is contrary to Neely v. United States, 546 F.2d 1059 (3d Cir. 1976), *superseded by rule as noted in*, United States v. Fiorelli, 337 F.3d 282, (3d Cir. 2003). However, Neely addressed merely the availability of the writ of error coram nobis to federal prisoners attacking their federal convictions in federal court. Neely did not purport to, nor did it, extend the availability of the writ of error coram nobis to convicts seeking to attack their state court convictions in federal court. Accordingly, Neely does not control this case nor does it require rejection of the Report.

Petitioner also seemingly suggests that 28 U.S.C. § 2072 somehow permits him to bring a petition for writ of error coram nobis in this Court to attack his state court judgment. However, Section 2072(b) clearly states that “[s]uch rules [of federal procedure and evidence as shall be promulgated by the United States Supreme Court] shall not abridge, enlarge or modify any substantive right.” As is made clear in the Report, Petitioner has no substantive right to bring an attack on a state court conviction in a federal court in any manner other than by means of a Petition for Writ of Habeas Corpus. And for the reasons explained in the Report, even construing the Petition as being a Petition for Writ of Habeas Corpus, it is still dismissible pre-service for lack of subject matter jurisdiction.

Accordingly, after *de novo* review of the Report and the Objections and the record of this case, it is hereby **ORDERED** that the Report is adopted as the opinion of the Court and we hereby **ORDER** that the Petition be dismissed. A certificate of appealability is **DENIED**.

Date: December 9, 2016

s/Nora Barry Fischer
NORA BARRY FISCHER
UNITED STATES DISTRICT JUDGE

cc: The Honorable Maureen P. Kelly
Chief United States Magistrate Judge

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